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Supreme Court, U.S.
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In The
Supreme Court of the United States

MARK E. OVERLAND, PAMELA POLOSKI, and OVERLAND & BORENSTEIN LLP,

Petitioners,

v.

COUNTY OF LOS ANGELES and SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a county government and a state superior court appropriate for their own use the interest actually earned on a cash deposit in lieu of bail, does the confiscation of the interest constitute a taking of private property under the Fifth and Fourteenth Amendments of the United States Constitution as applied in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980) and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), such that the county and the superior court must pay just compensation to the depositor under *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), if any compensation is due?

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PETITION FOR A WRIT OF CERTIORARI

Mark A. Borenstein, *Overland Borenstein Scheper & Kim LLP*, on behalf of *Mark E. Overland, Pamela Poloski and Overland & Borenstein LLP*, petitioners for a writ of certiorari to review the judgment of the California Court of Appeal following denial of review by the Supreme Court of the State of California.

OPINION BELOW

The opinion of the California Court of Appeal is reported at 126 Cal. App. 4th 131, 23 Cal. Rptr. 3d 676, *review denied*, May 11, 2005, and is reprinted in the Appendix to the Petition for a Writ of Certiorari. Pet. App. 1-17.

JURISDICTION

On January 28, 2005, the California Court of Appeal entered its decision. On March 9, 2005, Petitioners timely filed for review in the California Supreme Court. On May 11, 2005, the California Supreme Court denied review. Pet. App. 18. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." The relevant sections of the California Penal Code are also reprinted in the Appendix. Pet. App. 19-20.

STATEMENT OF THE CASE

Factual Background

California, just like every state and the District of Columbia,[1] satisfies the state and federal constitutional

[1] Ala. Code §§ 15-13-40, 15-13-111 & 15-13-158 (ALABAMA 2005); Alaska Stat. §12.30.020 & Alaska Rules of Court, Rules 41 & 43(d) (ALASKA 2005); Ariz. Rev. Stat. Rules Crim. Proc., Rule 7.1 (ARIZONA 2005); Ark. Code Ann. §16-84-115 (ARKANSAS 2005); Cal. Penal Code §§ 1295-1298 (CALIFORNIA 2005) (accrued interest, if directed by county, for benefit of courts); Colo. Rev. Stat. §§ 16-4-104 & 16-4-109 (COLORADO 2005); Conn. Gen. Stat. §§ 54-53 & 54-66 (CONNECTICUT 2005); Del. Code Ann. tit. 11, §§ 2102 & 2104 (DELAWARE 2005); D.C. Code Ann. §23-1321 (DISTRICT OF COLUMBIA 2005); Fla. Stat. ch. 903.16 & 903.17 (FLORIDA 2005); Ga. Code. Ann. §17-6-4 (GEORGIA 2005); Haw. Rev. Stat. §804-11.5 (HAWAII 2005); Idaho Code §19-2921 (IDAHO 2005); 725 Ill. Comp. Stat. §5/110-8 (ILLINOIS 2005); Ind. Code §35-33-8-3.2 (INDIANA 2005); Iowa Code §§ 811.1 & 811.2 (IOWA 2005); Kan. Stat. Ann. §§ 22-2802 & 22-2808 (KANSAS 2005); Ky. Rev. Stat. Ann. §§ 431.520, 431.530 & 431.535 (KENTUCKY 2005); La. Code Crim. Proc. Ann. Art. 324 (LOUISIANA 2005); Me. Rev. Stat. Ann. tit. 15, §§ 1026 & 1074 (MAINE 2005); Md. Code Ann., Criminal Procedure §5-205 (MARYLAND 2005); Md. Rules, Criminal Clauses, Rules 4-216 & 4-217 (MARYLAND 2005); Mass. Gen. Law. ch. 276, §§ 68 & 79 (MASSACHUSETTS 2005); Mich. Comp. Laws §§ 765.6c, 765.12, 765.13 & 765.17 (MICHIGAN 2005) ("Any interest accumulating . . .

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right to be free from excessive bail[2] by enacting a statutory bail system under which a cash deposit in lieu of bail may

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shall be paid into the general fund") (cash bail deposits subject to $10 administrative fee); Minn. Stat. §§ 629.16 & 629.53 (MINNESOTA 2005); Miss. Code Ann. §99-5-9 (MISSISSIPPI 2005); Mo. Rev. Stat. §§ 544.040 & 544.455 (MISSOURI 2005); Mont. Code Ann. §§ 46-9-401 & 46-9-502 (MONTANA 2005); Neb. Rev. Stat. §29-201 (NEBRASKA 2005); Nev. Rev. Stat. §178.502 (NEVADA 2005); N.H. Rev. Stat. Ann. §§ 597:2 & 597:3 (NEW HAMPSHIRE 2005) ("All money deposited for bail shall be held for the use of the state until the clerk of the superior court where the bail is deposited shall certify that no liability exists against the bail."); N.J. Stat. Ann. §3:26-4 (NEW JERSEY 2005); N.M. Stat. Ann. §5-401 (NEW MEXICO 2005); N.Y. Crim. Proc. Law §§ 500.10, 520.10 & 520.15(c) (NEW YORK 2005) ("Money posted as cash bail is and shall remain the property of the person posting it unless forfeited to the court"); N.C. Gen. Stat. §§ 15A-531 & 15A-534 (NORTH CAROLINA 2005); N.D. Rules Crim. Proc., Rule 46 (NORTH DAKOTA 2005); Ohio Rev. Code Ann. §§ 2937.22 & 2937.41 (OHIO 2005); Okla. Stat. tit. 22 §1106 (OKLAHOMA 2005); Or. Rev. Stat. §135.265 (OREGON 2005); Pa. Stat. Ann. tit. 234 §§ 528 & 535 (PENNSYLVANIA 2005); R.I. Gen. Laws §12-13-10 (RHODE ISLAND 2005); S.C. Code Ann. §§ 17-15-190 & 17-15-220 (SOUTH CAROLINA 2005); S.D. Codified Laws §§ 23A-43-2 & 23A-43-3 (SOUTH DAKOTA 2005); Tenn. Code Ann. §§ 40-11-116 & 40-11-119 (TENNESSEE 2005); Tex. Crim. P. Code Ann. §§ 17.01, 17.03, 17.42 & 22.16 (TEXAS 2005) (surety entitled to accrued interest less costs following forfeiture); Utah Code Ann. §77-20-4 (UTAH 2005); Vt. Stat. Ann. tit. 13 §7554 (VERMONT 2005); Va. Code Ann. §§ 19.2-119 & 19.2-123 (VIRGINIA 2005); Wash. Rev. Code §10.19 (WASHINGTON 2005); option of cash deposit not specified in state code, but local rules make reference to presumption of cash bail, *see, e.g.*, Bellingham Municipal Court, Local Court Rules, Rule 15 (WASHINGTON 2005); Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) Rule 3.2 (2005); W. Va. Code §§ 62-1C-2 & 62-1C-12 (WEST VIRGINIA 2005); Wis. Stat. §§ 969.001 & 969.03 (WISCONSIN 2005); Wyo. R. Cr. P. 46, Rule 46.1 (WYOMING 2005). All dates are from electronic databases.

[2] *See Stack v. Boyle*, 342 U.S. 1, 5 (1951) ("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or

be posted with the superior court or a county government. The cash deposit is held as security for a criminal defendant's appearance, and is exonerated and returned to the original depositor after the defendant appears. Cal. Penal Code §1297. The period of time during which the cash deposit is held is often many months or in the case of one of the Petitioners, more than a year. In Los Angeles County alone, there are more than 1 million cash bail depositors subject to this litigation. Respondents have returned the principal amount of the cash to each depositor, but have not paid to the depositors any portion of the millions of dollars in interest actually earned on the cash deposits. All 57 counties in California engage in the same practice, and Petitioners believe actual earned interest is not paid to cash depositors in any state.

In this case in three separate criminal prosecutions in the Los Angeles County Superior Courts, Petitioners deposited cash in lieu of bail to secure the appearance of three defendants. On September 21, 2000, Petitioner Overland deposited $500,000; on December 20, 2002, Petitioner Poloski deposited $35,000; and on July 12, 2003, Petitioner Overland & Borenstein deposited $250,000. *Overland v. Superior Court*, 126 Cal. App. 4th 131, 134-35 (2005); Pet. App. 2-4.

In each case, the clerk of the superior court transferred the cash deposit to the Los Angeles County's auditor-controller, who deposited the money into a County trust fund called the "TK7 Trust Fund." The County of Los Angeles invested the cash bail deposits and during the

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the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.") (internal citations omitted).